

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

RUTHANN DRUSH)	
Claimant)	
)	
VS.)	
)	
GOLDEN PLAINS REHAB. CENTER)	
Respondent)	Docket No. 1,066,328
)	
AND)	
)	
DIAMOND INSURANCE CO.)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier (respondent) request review of the March 5, 2014, preliminary hearing Order entered by Administrative Law Judge (ALJ) Thomas Klein. Matthew Bretz, of Hutchinson, Kansas, appeared for claimant. P. Kelly Donley, of Wichita, Kansas, appeared for respondent.

The record on appeal is the same as that considered by the ALJ and consists of the preliminary hearing transcript, with exhibits dated September 25, 2013, the discovery deposition transcript of Ruthann Drush, dated September 5, 2013, the deposition transcript of Roberta Osenbaugh, with exhibits dated November 4, 2013, the deposition transcript of Vicki Hooker, with exhibits dated November 4, 2013, and all pleadings contained in the administrative file.

The ALJ found the following:

The claimant testified that she must have tripped over the dog. Respondent and Ms. Osenbaugh cast some doubt on this, and suggest that the fall was idiopathic, or a neutral risk.

The court does not find it necessary to reach a conclusion about whether claimant tripped over the dog or not. The fact that the claimant was responding quickly to a call for help from a resident clearly places the claimant in a circumstance not shared by the general public and that situation arose out of and in the course of her employment. The specific circumstance, whether the claimant

tripped over the dog or fell when hurrying to respond to a resident's call for help is of no difference. Either circumstance is compensable as a work injury.

The court authorizes the treatment of Dr. Goin. The court orders TTD benefits from July 12, 2013 through September 10, 2013 at the appropriate rate. The court orders any unpaid and related medical bills paid as authorized. The court further orders the respondent to reimburse claimant for out of pocket expenses in the amount of \$129.48 as authorized medical.

ISSUES

Respondent requests review of whether or not claimant sustained an accident arising out of and in the course of her employment. Respondent contends that claimant's accident was the result of an idiopathic cause and is not compensable.

Claimant argues the ALJ's Order should be affirmed.

The only issue before the Board is: did claimant sustain personal injury by accident arising out of and in the course of employment with respondent?

FINDINGS OF FACT

After reviewing the evidentiary record compiled to date and considering the parties' arguments, the undersigned Board Member finds:

At the time of claimant's deposition on September 5, 2013, claimant worked for respondent for 6 years and had been receiving social security retirement benefits for approximately 4-5 years. Claimant is a licensed nurse (LPN). Her job duties involve helping clients with changing bandages, feeding, taking their temperature, walking assistance, being a charge nurse for the dementia unit and supervising certified nurse aides (CNA).

Claimant sustained an accidental injury on July 12, 2013, in the hallway of the southwest wing. On that date she was the floor charge nurse. She described the accident as follows:

Q. What happened?

A. We heard a resident yelling, help me, help me. And whenever we hear anything like that, it is the rule that anybody around is to go to that room. So I got up along with Roberta got up because we're in the same office. And there were some aides on the floor, too. And so we were all hurrying down the hall because it was coming from the end of the hall. And we were all rushing down the hall to get to the person. And there was a little dog there. She was kind of running around my feet. And so

I wanted to get around her so I could go a little faster -- or not go any faster but just get there. And I went to get around the dog and fell.

Q. Did you trip over the dog?

A. I think so. That's the last thing I remember seeing was the dog.

Q. So do you know if you did or not?

A. I think I tripped over the dog because I looked at her and I saw the dog. And I thought, you better move Ruthan [sic]. So in trying to avoid him is what I was trying to do.¹

Claimant testified Roberta Osenbaugh did not see the fall because she was walking in front of claimant. Claimant was transported by ambulance to a hospital in Hutchinson, Kansas. She was admitted for three weeks due to a left hip fracture and discharged on August 2, 2013.

At the preliminary hearing, claimant again was asked to explain what happened on July 12, 2013, for which she testified as follows:

There was a resident hollering, "help me, help me," coming from the end of the hall. I got up off -- away from my desk and rapidly was walking to where she was at the end of the hall. There was one lady in front of me, Roberta Osenbaugh, and I looked down and there was a small dog right in front of me, and I was not walking or running, I was rapidly trying to get to the resident, and tried to get around the dog and fell.²

Claimant also testified at the preliminary hearing as follows:

Q. Ma'am, as you sit here today, do you recall whether you actually tripped on the dog or do you know?

A. I would say I tripped over the dog. I looked down and there was the dog, and I was trying to get around the dog because I was walking rapidly to get to the resident, and that's when I fell, trying to get around the dog. Seems to me, I tripped over the dog, but he was right there.³

¹ Claimant Depo. at 12-13.

² P.H. Trans. at 8.

³ *Id.* at 14.

Claimant testified that Ms. Osenbaugh was approximately 10 feet in front of claimant when she fell. Claimant was uncertain why the dog was in the nursing home as it is not a therapy dog. Ms. Osenbaugh's dog has not been at the facility since claimant has returned to work. Approximately a week before the preliminary hearing, claimant returned to accommodated work at respondent within her restrictions.

Ms. Osenbaugh testified that on the date of the accident, she and claimant shared an office. She indicated that any time a resident calls for help, everybody that is free responds. Ms. Osenbaugh indicated it was claimant's obligation to respond swiftly to a resident's need. On the day of claimant's accident, Ms. Osenbaugh brought her dog, a Yorkie, to work, which she had done on several prior occasions. She described claimant's fall as follows:

Q. Okay. Now what I would like you to do is take off from there, and in your own words, kind of describe what happened from that point forward.

A. Okay. The resident yelled for help, and of course, I got up, started down the hall. Ruthann was following me. Sorry. She was behind me on the right side, and I was kind of in the middle of the hall.

Q. What happened then?

A. I heard the sound, just a smack sound, and when I turned around, she was on the floor.

Q. What did you do?

A. I immediately went to assess her. I sat down beside her and started, you know, checking to make sure she was okay. She said her leg hurt really bad, and she couldn't move it, so I told her not to move, and I yelled at one of the nurse aides to go and get our supervisor.⁴

. . .

Q. Did you talk to Ms. Drush at all about what had happened?

A. I asked her what had happened, and she said she didn't know, she thought she just tripped over her own feet.⁵

Ms. Osenbaugh testified claimant generally used a handrail while she walked down the hall and was not as fast as Ms. Osenbaugh. Ms. Osenbaugh testified claimant was

⁴ Osenbaugh Depo. at 6-7.

⁵ *Id.* at 8.

credible and likeable. She admitted not witnessing claimant's fall. She further testified her dog was in front and to the right of her when she was walking fast down the hall. Ms. Osenbaugh thought claimant was about 10-12 feet behind her when claimant fell. She said there was never a time before she heard the smack of claimant hitting the floor when she could not see her dog. Ms. Osenbaugh did not think it was possible for claimant to trip over the dog.

Ms. Osenbaugh completed an incident report the same day as claimant's accident, indicating she was unsure why claimant fell and that claimant stated she tripped over her own feet. Within two days after the accident, Vicki Hooker, respondent's Director of Nursing, asked Ms. Osenbaugh the location of the dog. On September 12, 2013, Ms. Osenbaugh was again asked by Ms. Hooker about the dog's location. Ms. Osenbaugh was asked to clarify the location of the dog and completed an addendum which was added to her initial accident report regarding the dog.

On cross-examination, Ms. Osenbaugh testified she decided to not bring the dog to work anymore. She had been asked by Ms. Sharon Kuker, respondent's administrator, to not bring the dog to work.

Q. And at the time of the -- or at the time you headed out of the door, where was the dog?

A. The dog was behind me when I first went out the door of the office, and then when I started down the hall she got in front of me.

Q. All right. And was she on your right -- the dog, was she on your right or your left?

A. The dog was on the left side.

Q. All right. And as she passed you, did she pass you on your right or your left?

A. On the right. I was kind of in the middle of the hall, and she came right up beside me on the -- on the left side, sorry.

Q. Okay. The dog passed you on the left and then walked ahead of you still on your left?

A. Yes.

Q. And Ms. Drush was behind you on your right?

A. Yes.⁶

⁶ *Id.* at 27-28.

Ms. Osenbaugh testified there is a camera in the hallway, but it is only for the employees in the office to be able to see what is going on in the hallway.

Ms. Hooker learned of claimant's fall from a nurse aid and immediately went to the scene, where she saw claimant laying in the middle of the floor. Ms. Hooker asked claimant what happened and she responded that she did not know. Ms. Hooker observed nothing in the hall for claimant to trip on and no wet spots. After an ambulance was called, Ms. Hooker again spoke to claimant about the accident. Claimant indicated she was not hurrying when she fell, was not using her cane and was wearing her usual shoes. She asked claimant where the dog was at and she responded that the dog was in front of Ms. Osenbaugh.

Two days later, Ms. Hooker visited the hospital to check on claimant. She testified of her conversation with claimant:

Q. Would you tell the Court what discussions you had with Ms. Drush at that time?

A. Well, I took her a little gift, and told her that I was there to check on her because I was concerned about her, and you know, kind of told her what the gifts were about, that they were things like using those bubbles that kids blow to blow your pain away, that kind of thing; and then I told her, I said, "You know, Ruth, I've just got to ask you a couple of questions to finish my investigation so that I can see if there's anything we need to do to prevent somebody else from falling," and I asked her, "Was there anything on the floor?" And she said, "No." And I said, "Where -- where were you at?" And she said she was going down the hall, and I said, "Roberta was with you," or something like that, and she said Roberta was in front of her, and I said -- I said, "Where was the dog at," because the dog was visiting that day, and she says, "The dog was in front of Roberta," and I said, "Are you sure about that?" And she says, "Yeah," and then she got quiet, then really wouldn't talk any more about it.⁷

On cross-examination, Ms. Hooker testified:

Q. Did Ms. Drush ever tell you where the dog was while there at the scene of the fall and before she left in the ambulance?

A. Yes. When I asked her, you know, "Where were you at," and she said she was walking up the hall, and she said Roberta was in front of her, and I said, "Where was everybody else?" She didn't know. And so I said, "Where was the dog?" And she said, "In front of Roberta, as usual."⁸

⁷ Hooker Depo. at 12-13.

⁸ *Id.* at 20.

PRINCIPLES OF LAW AND ANALYSIS

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.⁹ “‘Burden of proof’ means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.”¹⁰

K.S.A. 2013 Supp. 44-508(f), in part, provides:

(3) (A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:

(i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;

(ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;

(iii) accident or injury which arose out of a risk personal to the worker; or

(iv) accident or injury which arose either directly or indirectly from idiopathic causes.

Only claimant witnessed her actual fall. On two occasions claimant testified she thought she tripped over the dog. The undersigned Board Member finds claimant was a credible witness and that she either tripped over Ms. Osenbaugh's dog or tripped while avoiding the dog. That is a risk unique to claimant's job. Claimant's accidental fall, caused by tripping over the dog or while attempting to avoid the dog did not arise from an idiopathic cause.

This Board Member also agrees with the ALJ that even if claimant did not trip over the dog or while avoiding the dog, her personal injury by accident arose out of and in the course of her employment. One of claimant's job obligations was to respond to emergency calls from residents. Claimant's fall was the result of a work risk. Simply put, had claimant not been required to respond to the emergency, she would not have tripped and fallen.

⁹ K.S.A. 2013 Supp. 44-501b(c).

¹⁰ K.S.A. 2013 Supp. 44-508(h)

Respondent cites *Graber*¹¹ and *Bieberle*¹² in support of its position. Mr. Graber went to the restroom and never recalled leaving. He fell down some stairs, but did not know why or how he fell. A Board Member held Mr. Graber's fall arose from an idiopathic fall. Ms. Bieberle was walking to the restroom and speaking to a co-worker and started walking backwards, stumbled and fell. The Board Member that decided *Bieberle*, found there was no explanation for Ms. Bieberle's fall or any connection to her work.

There was one significant factual difference between *Graber* and *Bieberle* and the current claim, to wit: Mr. Graber and Ms. Bieberle fell while going to or coming from a restroom. Going to the restroom is normally not a risk particular to work, but rather is an activity of day-to-day living. In the current claim, claimant tripped and fell while performing a job duty that Ms. Osenbaugh described as an obligation.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.¹³ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2013 Supp. 44-551(I)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.¹⁴

WHEREFORE, the undersigned Board Member finds that the March 5, 2014, preliminary hearing Order entered by ALJ Thomas Klein is affirmed.

IT IS SO ORDERED.

Dated this 19th day of May, 2014.

HONORABLE THOMAS D. ARNHOLD
BOARD MEMBER

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Hon. Thomas Klein, ALJ

¹¹ *Graber v. Dillon Co.*, No. 1,057,449, 2012 WL 2890470 (Kan. WCAB Jun. 22, 2012).

¹² *Bieberle v. State of Kansas*, No. 1,064,235, 2013 WL 5521850 (Kan. WCAB Sep. 23, 2013).

¹³ K.S.A. 2013 Supp. 44-534a.

¹⁴ K.S.A. 2013 Supp. 44-555c(j).